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IN THE

Supreme Court of the United States

October Term, 1965

NO. ~~1965~~ 193

SAM HOOVER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT AT NEW ORLEANS

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IN THE

Supreme Court of the United States

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NO._____

SAM HOOVER, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT AT NEW ORLEANS

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above entitled and numbered cause.

OPINIONS BELOW

The opinion of the Court of Appeals is unreported. It is printed in Appendix A on pages 11-15 hereof.

JURISDICTION

The judgment of the Court of Appeals was entered on April 1, 1966. (Appendix B, page 16 hereof). Rehearing was denied on May 9, 1966. (Appendix C, page 17 hereof). The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

The trial court included in the charge an instruction incorrectly advising the jury that petitioner conceded the truth of one of the essential elements of each offense for which he was on trial, to wit, the element of wilfulness. It is impossible to say, on the present record, that the jury's implied finding of wilfulness as to each offense was not solely a product of that instruction rather than a proper response to the evidence.

(a). Did the action of the trial court in including that instruction in the charge and in entering judgment of conviction as to each count on the verdict of guilty returned in response to that charge operate to deprive petitioner of his right to trial by jury guaranteed by the Sixth Amendment of the United States Constitution?

(b). Does the fact that it is impossible to say, on the present record, that the jury's implied finding of wilfulness with respect to the offense charged by each count was not solely a product of such instruction rather than a proper response to the evidence operate to cause the judgment of conviction to be invalid under the Due Process Clause of the Fifth Amendment of the United States Constitution?

CONSTITUTIONAL PROVISIONS INVOLVED

The following provisions of the United States Constitution are involved: (a) the provision of the Sixth Amendment that "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."; and (b) the provision of the Fifth Amendment that no person shall be deprived of liberty "without due process of law."

STATEMENT

By this petition the petitioner seeks review of a decision of the Court of Appeals for the Fifth Circuit affirming judgment[1] entered by the trial court on a verdict finding him guilty of wilfully making, for each of the calendar years 1957, 1958, 1959 and 1960, a false income tax return he did not believe to be true and correct as to every material matter, in violation of 26 U.S.C. Sec. 7206(1).[2]

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[1] The judgment fined petitioner $2,500 on each of the four counts and sentenced him to two years confinement on each count, the sentences to run consecutively for a period of eight years, such period to begin when petitioner is released from Federal custody (R. 1415-6). At the time of entry of such judgment petitioner was, and still is, confined in the Texas Department of Corrections at Huntsville, Texas serving a sentence of sixty years imposed by the Criminal District Court No. 4 of Harris County, Texas on November 20, 1964 following a trial in which a jury found him guilty of the offense of accomplice to robbery. A habeas corpus proceeding challenging the validity of that sentence under the Federal Constitution is pending in Houston, Texas before the U. S. District Court for the Southern District of Texas.

[2] This statute provides, in pertinent part, as follows: "Any person who . . . wilfully makes and subscribes any return . . . which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he did not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

It was necessary for the Government to establish and the jury to find, as an essential element of each of the four offenses of which petitioner was found guilty,[3] that

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[3] Count One was as follows:

"That on or about the 7th day of April, 1958, in the Houston Division of the Southern District of Texas, Sam Hoover did wilfully and knowingly make and subscribe a false Form 1040, United States Individual Tax Return for the calendar year 1957, which was verified by a written declaration that it was made under the penalties of perjury, which said Form 1040, United States Individual Tax Return for the calendar year 1957, he did not believe to be true and correct as to every material matter in that the said Form 1040, United States Individual Tax Return for the calendar year 1957, reported total receipts from his principal business activity, attorney at law, in the amount of $36,726.82, and no receipts from illegal sources, whereas, as he then and there well knew and believed he had total receipts from his principal business activity, attorney at law, in a greater amount than reported, and he had receipts from illegal sources. Violation of Section 7206(1) Internal Revenue Code; 26 U.S.C. Section 7206(1)." (R. 1272).

Count Two was as follows:

"That on or about the 5th day of March, 1959, in the Houston Division of the Southern District of Texas, Sam Hoover did wilfully and knowingly make and subscribe a false Form 1040, United States Individual Tax Return for the calendar year 1958, which was verified by a written declaration that it was made under the penalties of perjury, which said Form 1040 United States Individual Tax Return for the calendar year 1958, he did not believe to be true and correct as to every material matter in that the said Form 1040, United States Individual Tax Return for the calendar year 1958, reported total receipts from his principal business activity, attorney at law, in the amount of $46,417.15, and no receipts from illegal sources, whereas, as he then and there well knew and believed he had total receipts from his principal business activity, attorney at law, in a greater amount than reported, and he had receipts from illegal sources. Violation of Section 7206 (1), Internal Revenue Code; 26 U.S.C. Section 7206(1)." (R. 1272-3)

Count Three was as follows:

"That on or about the 25th day of April, 1960, in the Houston Division of the Southern District of Texas, Sam Hoover did wilfully and knowingly make and subscribe a false Form 1040, United States Individual Tax Return for the calendar year 1959, which was verified by a written declaration that it was made under the penalties of perjury, which said Form 1040, United States Individual Tax Return for the calendar year, 1959, he did not believe to be true and correct as to every material matter in that the said

there was a *wilful* making and subscribing by petitioner of each of the returns in question.

The issue whether that essential element existed as to each count was raised by petitioner's own testimony.[4]

Form 1040, United States Individual Tax Return for the calendar year 1959, reported total receipts from his principal business activity, attorney at law, in the amount of $27,926.00, and no receipts from illegal sources, where as, as he then and there well knew and believed he had total receipts from his principal business activity, attorney at law, in greater amount than reported, and he had receipts from illegal sources. Violation of Section 7206(1) Internal Revenue Code; 26 U.S.C. Section 7206(1)." (R. 1273-4).

Count Four was as follows:

"That on or about the 28th day of April, 1961, in the Houston Division of the Southern District of Texas, Sam Hoover did wilfully and knowingly make and subscribe a false Form 1040, United States Individual Tax Return for the calendar year 1960, which was verified by a written declaration that it was made under the penalties of perjury, which said Form 1040, United States Individual Tax Return for the calendar year 1960, he did not believe to be true and correct as to every material matter in that the said Form 1040, United States.

[4] Appellant's testimony was accurately summarized by the trial court in the charge as follows (R. 1196 et seq):

> "After the Government's case, looking only to the legitimate clients again and showing these various amounts which appear on the blackboard, which apparently did not find their way into the defendant's bank account and into his income tax return, the defense offered its explanation. The defendant testified at considerable length about these various documents. His testimony, as I understand it, was that as to a few of them, perhaps two or three, as I recall, he conceded that he had received certain monies, that it did constitute a fee, and that it should have been reported; that it was an honest mistake. The amounts, as I recall it, were quite small and he simply told us that he had no explanation as to why it wasn't on his income tax, and it should have been. Being an honest mistake, of course, if you should accept his testimony, that would not be a violation of law.

(R. 1197)

> "Certain other of the items as to his testimony, he told us that he simply did not have any clear recollection at this time, but he told us that he thought he knew what had happened, and more or less speculated probably it had been paid out in

The trial court undertook to submit that issue as to each count by means of the following language in the charge:

(R. 1191)

"The term 'wilfully' is also used. A failure to act is wilfully done if done voluntarily and purposely and with the specific intent to do that which the law forbids, that is to say, with evil motive or bad purpose either to disobey or to disregard the law.

* * *

"So what are the elements of the offense with which the defendant is charged? They are these: It must be shown that there was a wilful making and subscribing, that is, signing of an income tax return by the defendant. IT IS CONCEDED THAT THAT WAS THE CASE IN ALL FOUR YEARS. Second, that the returns must contain a written declaration that it is made under the penalty of perjury. That also

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restitution, or perhaps on a bond fee or something to that effect. There were, as I recall, two or three, three or four other items of that nature. They also were not large in amount.

"As to most of the items, having examined his clients' cards or what other records were available, as I understood his testimony, he told us that he did not know what had happened; He told us that he had a clear recollection about a great many of these matters, and he gave the explanation. In many cases, he told us that the money which he had received and had not deposited had been paid to other people, cash out of hand, as a bond fee or as a fine for the client or something of that sort. He gave what appeared to me to be clear and plausible explanation of those items.

* * * *

(R. 1199)

"As to the convict-type clients, Mr. Hoover testified, as I recall it, that the testimony these convicts had given against him was completely false; he denied it in its entirety.

* * * *

(R. 1200)

"The defendant's theory, in brief, as I understand it, is that he may have made a few honest mistakes, few in number compared with the large number of clients that he represented, on his tax returns for the years in question. * * *"

is admitted for all four years. And third, the maker must not believe that the return was true and correct as to every material matter, and that this must have been knowingly and wilfully done.

"Those are the elements which the Government must prove to your satisfaction beyond a reasonable doubt as to each of the counts in question.

* * *

(R. 1192)

"To be a violation, there must be a failure to report in a material respect, and as I have said, it must have been done wilfully and knowingly, that is, the defendant must have been aware that he was not including these items which he knew should have been included in his return.

* * *

(R. 1202)

". . . while I will instruct you that it would be necessary for the omission, if there was an omission of income, to have been substantial, a few insignificant omissions, in my judgment, would not be enough to justify your finding the omission to have been wilfull, nevertheless the amount need not be proved with any accuracy. * * *" (Emphasis added)

This language, it will be observed, contained the following instruction:

"It must be shown that there was a *wilful* making and subscribing that is, signing of an income tax return by the defendant. It is *conceded* that that was the case in all four years." (Emphasis added).

Petitioner contends this instruction could reasonably have been construed by the jury as advising them there was as to each count a concession by petitioner of the essential element of wilfulness and that since he did not in fact make any concession of that kind the giving of this instruction constituted fundamental error warranting reversal even

though unobjected to in the trial court. Rejecting this contention, the Court of Appeals held this instruction would in no event bear that construction, saying:

> "Further, we do not believe the trial Judge said there had been a concession of the essential element of wilfulness. The statement made simply refers to the fact that the return had been signed."

This analysis by the Court of Appeals is obviously faulty. It leaves out of account the word "wilful" contained in the phrase "It must be shown that there was a *wilful* making and subscribing." There is no warrant, either in law or semantics, for eliminating that word. That word was undeniably present. Because of its presence the jury reasonably could have construed the instruction as advising them there was as to each count a concession by petitioner of the essential element of wilfulness.

REASONS FOR GRANTING THE WRIT

The trial court's incorrect instruction advising the jury that petitioner conceded there was a wilful making of each of the returns by him could reasonably have been construed by the jury as compelling them, as to each count, to resolve the issue of wilfulness against petitioner *at all events*.

That instruction, so construed by the jury, would necessarily operate, as to each count, to prevent the jury from deciding the essential issue of wilfulness on the basis of the evidence alone and would accordingly produce a violation, not only of petitioner's Sixth Amendment right of trial by jury, but also his right to a fair trial guaranteed by the Due Process Clause of the Fifth Amendment.

Did the jury so construe that instruction?

There is no way of knowing. Their verdict was a general one and no procedure is available for unlocking its secrets.

The thing of controlling importance is that it is impossible, on the present record, to say that the jury did *not* so construe that instruction and make it, rather than the evidence, the sole basis for their finding of wilfulness as to each count. Since the jury reasonably might have done so there is no way of being certain they did not do so and therefore there applies the rule which vitiates a verdict incapable of being shown *not* to rest on a basis impermissible under the United States Constitution.[5]

Invoking that rule now, petitioner respectfully submits that the judgment of conviction is invalid under the Due Process Clause of the Fifth Amendment and the trial-by-jury provision of the Sixth Amendment because based on a verdict incapable of being shown not to include as to each count a finding of wilfulness that was solely a product of the aforementioned instruction rather than a proper response to the evidence.

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[5] Williams v. North Carolina, 317 U.S. 287, 292 (1942) (". . . if one of the grounds for conviction is invalid under the Federal Constitution, the judgment cannot be sustained. * * * To say that a general verdict of guilty should be upheld though we cannot know that it did not rest on the invalid constitutional ground on which the case was submitted to the jury would be to countenance a procedure which would cause a serious impairment of constitutional rights.")

Grunewald v. United States, 353 U.S. 391, 413-4 (1957) ("Since, under the judge's charge, the convictions on Count 1 might have rested on an impermissible ground, we conclude that they cannot stand, and the petitioners must be given a new trial as to this Count.")

Cramer v. United States, 325 U.S. 1, 36 (1945) ("The verdict. . . was a general one of guilty, without specific findings as to the acts on which it rests. Since it is not possible to identify the grounds on which Cramer was convicted, the verdict must be set aside if any of the separable acts submitted was insufficient.").

Terminiello v. City of Chicago, 337 U.S. 1 (1949) (The charge in this case submitted multiple inculpatory theories, at least two of which were constitutionally impermissible as basis for conviction. HELD that since it was impossible to say the verdict did not rest on one of these impermissible theories the conviction would not be allowed to stand.)

Petitioner did not lose his entitlement to urge this claim because of failure to object to that instruction in the trial court. This follows from the fundamental nature of this claim. The constitutional right petitioner seeks to vindicate by this claim, — i.e., the right to be free from conviction save on the basis of a verdict unequivocally establishing all essential elements of the crime charged,—was not forfeited merely because no objection germane to that right was interposed by petitioner against the charge in the trial court. The infringement of that right by the trial court, which occurred when that court entered against petitioner in this case a judgment of conviction on a verdict reasonably capable of being construed as including as to each count a finding of wilfulness based entirely on the aforementioned instruction, constituted plain error available to petitioner on appeal even though no objections to the charge were made in the trial court.[6]

CONCLUSION

For the reasons given, a writ of certiorari should be granted.

Respectfully submitted,

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[6] Terminiello v. City of Chicago, 337 U.S. 1 (1949); Stromberg v. California, 283 U.S. 359 (1931). And see cases cited in footnote 5, supra.

APPENDIX "A"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 22313

SAM HOOVER, *Appellant*

versus

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Southern District of Texas.

(April 1, 1966.)

Before BELL and THORNBERRY, Circuit Judges, and FISHER, District Judge

FISHER, District Judge: This appeal is from a conviction under 26 U.S.C. 7206(1). Appellant was indicted for making false income tax returns in a four count indictment, with each count relating to one of the four years, 1957 through 1960. The jury found appellant guilty on all four counts and the trial Court assessed a fine of $2,500.00 on each count and imposed a sentence of two years on each count, said sentences to run consecutively for a period of eight years. The Indictment was drafted in the language

of the statute, 26 U.S.C. 7206(1), and the appellant raises the following assignment of errors on appeal:

1. The counts of the indictment fail to allege an offense.

2. The trial Court advised the jury in effect that there has been, as to each count, a concession by appellant establishing the element of wilfullness.

3. The trial Court failed to instruct the jury on all of the essential elements of each offense.

The District Court was correct in denying appellant's motion to dismiss the Indictment because the Indictment alleges the offense substantially in the language of Section 7206(1), which contains all of the essential elements of the offense and is thus sufficient within the meaning of Rule 7(c), Federal Rules of Criminal Procedure. An indictment alleging an offense substantially in the language of the statute is sufficient unless the words of the statute do not contain all of the essential elements of the offense. *Russell v. U.S.*, 1962, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240; *Reynolds v. U.S.*, 225 F.2d 123 (5 Cir. 1955) cert. den. 350 U.S. 914 (1955).

As to the second contention, appellant has seized upon one sentence of the charge and isolated it as error, the particular sentence being, "It must be shown that there was a wilfull making and subscribing, that is, signing of an income tax return by the defendant. It is conceded that was the case in all four years."

We do not agree that this sentence taken in context with the entire charge excuses the jury from finding beyond a reasonable doubt "wilfullness" on the part of the appellant in the commission of the said offenses. That such a charge had, or might have had, any effect upon the jury is a ra-

ther strained argument. No objection to the Court's charge was made and it can hardly be argued that the jury was affected to the detriment of the appellant by this charge when it was obvious that none of the experienced trial lawyers representing the appellant were so affected.

Further, we do not believe the trial Judge said there had been a concession of the essential element of "wilfullness". The statement made simply refers to the fact that the returns had been signed. This fact was not controverted and was supported by substantial evidence. Further, in the same paragraph the Court charged,

> "The returns must contain a written declaration that it is made under the penalty of perjury. That also is admitted for all four years. And third, the maker must not believe the return was true and correct as to every material matter, and that this must have been knowingly and wilfully done. Those are the elements which the Government must prove to your satisfaction beyond a reasonable doubt as to each of the counts in question."

In addition, the trial court made numerous references to the fact that a mere omission might not necessarily be criminal, but that appellant must have wilfully and knowingly filed a return that was not true and correct.

In *U. S. v. Vasilaky*, 168 F.2d 191 (C.A. 2, 1948), the trial Judge inadvertently used the expression "by a preponderance of the evidence" one time but all through the charge used the language, "beyond a reasonable doubt." It was held that the single mistake of the use of the phrase "by a preponderance of the evidence" was patently a slip of the tongue mistake which the trial Judge would have corrected had counsel for defendant called attention to the mistake, and the single slip did not mislead the jury.

We find no error in the Court's charge in regard to appellant's assignment number two.

The appellant's other assignment of error deals with the contention that the Court failed to instruct the jury on all of the essential elements of each offense and particularly failed to charge the jury on the term "material". Appellant argued that this omission, while not objected to at the trial, clearly constituted plain error under Rule 52(b), Federal Rules of Criminal Procedure.

The Court instructed the jury, ". . . and while I will instruct you that it would be necessary for the omission, if there was an omission of income, to have been substantial, a few insignificant omissions, in my judgment, would not be enough to justify your finding the omission to have been wilful . . ." This instruction is certainly more than adequate to inform the jury that such omission of income, if any, must be of a "material matter". This instruction could not have prejudiced the appellant.

The only question arising as to the element of "material matter" in a prosecution under Section 7206(1)[1] is whether there is a fact issue of materiality to be submitted to the jury or whether materiality can be found as a matter of law.

Section 7206(1) is similar in nature to a perjury prosecution which makes the gravamen of the offense false swearing as to material matter, and it was held in *Black-*

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[1] §7206(1) Fraud and false statements

"Any person who—(1) Declaration under penalties of perjury. Wilfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . ."

mon v. United States, 108 F.2d 572, 574 (C.A. 5, 1940); *United States v. Moran*, 194 F.2d 623, 626 (C.A. 2, 1952), cert. den. 343 U.S. 965 (1952), that the trial Court should have instructed the jury that the item was material as a matter of law, but in both cases the question of materiality was left to the jury. In both cases the Court held that by submitting the issue of materiality to the jury no possible error resulted which affected the substantial rights of the defendant.

In a prosecution under Section 7206(1) the defendant is charged with the offense of willfully subscribing to a return verified by a written declaration that is made under penalty of perjury which the taxpayer does not believe to be true and correct as to every material matter. On the basis of the reasoning employed in the perjury cases, the trial Court could, in the principal case, have decided that the subject matter was material as a matter of law, but since the question of materiality was submitted to the jury and the jury was required to find a material omission in amount in order to sustain the legal requirement of materiality, the appellant could not be and, we hold, was not prejudiced.

The Trial Court adequately instructed the jury on all essential elements of the offense charged, including the element of "material matter". No error appearing as to any of the assignments, the judgment is AFFIRMED.

APPENDIX "B"

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1965

NO. 22313

D. C. Docket No. 64-H-52-Criminal

SAM HOOVER, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Southern District of Texas

Before BELL and THORNBERRY, Circuit Judges, and FISHER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 1, 1966

Issued as Mandate: MAY 17, 1966

APPENDIX "C"

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 22,313

SAM HOOVER, *Appellant,*

v.

UNITED STATES OF AMERICA, *Appellee.*

Appeal from the United States District Court for the Southern District of Texas

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(MAY 9, 1966)

Before BELL and THORNBERRY, Circuit Judges, and FISHER, District Judge.

PER CURIAM:

IT IS ORDERED that Appellant's petition for rehearing in the above entitled and numbered cause be, and the same is hereby DENIED.